2003

State of Utah v. Thomas Kevin Rothlisberger : Reply Brief

Utah Court of Appeals

Mr. Brett J. Delporto; Attorney General's Office; Attorney for Appellee.
Barton J. Warren; Attorney for Appellant.

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	**Case No. 20030494-CA**
THOMAS KEVIN ROTHLISBERGER,	:	
	:	
Defendant/Appellant.		

REPLY BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JUDGMENT AND SENTENCE
ENTERED IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH,
THE HONORABLE LYLE R. ANDERSON, JUDGE, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

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STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
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REPLY BRIEF OF APPELLANT

ARGUMENT

I. ADAIR'S TESTIMONY WAS EXPERT TESTIMONY

The State argues in its brief that Chief Adair's testimony was nothing more than lay testimony under UT. R. EVID. 701. *See, Brief of Appellee* at pp. 13-18. First, the State cites to a 1987 Utah Supreme Court case[1] that indicates ". . .that witnesses who testify about matters that may be subject to scientific analysis are not necessarily expert witnesses under Rule 702." *Id.* at pp. 13-14. UT. R. EVID. 702 clearly indicates that a witness qualified as an expert may testify in the form of an opinion or otherwise through their own "...scientific, technical or *other specialized knowledge*" (emphasis added). Appellant's argument that Adair testified as an expert witness was not under the assumption that the testimony was

[1] State v. Ellis, 748 P.2d 188 (Utah 1987).

"scientific" but that it was within the "specialized knowledge" of Chief Adair. *See, Brief of Appellant* at pp. 16-19.

The State inaccurately endeavors to convince this Court that Appellant's reliance upon U.S. v. McDonald[2] is misplaced stating that "...*McDonald* is readily distinguishable because the defendant objected to the testimony, not because it was opinion testimony, but because he claimed it was so-called 'profile' evidence that improperly invaded the province of the jury...[and]...because it does not address the question of whether such testimony, although admissible through an expert, may also be admitted through a lay fact witness, such as Chief Adair." *Brief of Appellee* at p. 17. The State mistakenly focuses on the fact pattern of McDonald, instead of looking to its reliance upon in the 10th Circuit Court of Appeals' decision on this issue under United States v. Muldrow, 19 F.3d 1332, 1338 (10th Cir.). To deem Adair's testimony as admissible as a "lay fact witness" would require undermining not only Muldrow, but nearly all of the federal circuits' determinations on the issue.

Nearly all of the federal circuits have recognized that law enforcement testimony regarding opinions or conclusions pertaining to drug trafficking activities require "specialized knowledge," as dictated under FED. R. EVID. 702 and replicated under UT. R. EVID. 702 regarding expert testimony. The 10th Circuit Court of Appeals has long recognized the expert nature of law enforcement officers' testimony when they give their opinions or

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[2] 933 F.2d 1519 (10th Cir.), *cert. denied.*, 502 U.S. 897, 112 S.Ct. 270, 116 L.Ed.2d 222 (1991).

conclusions regarding drug trafficking activities[3]. The recognition, as plainly articulated by the 9th Circuit Court of Appeals, is that testimony regarding such matters calls upon specialized knowledge and does not relate "to matters 'common enough' to qualify as lay opinion testimony." United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir.1997), *cert. denied*, 523 U.S. 1131, 118 S.Ct. 1823, 140 L.Ed.2d 959 (1998). It is well-recognized throughout the United States that expert testimony on the operations of drug dealers, or drug trafficking, is appropriate because these matters are not within the common knowledge of the average juror[4].

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[3] *See, e.g.,* United States v. Diaz-Zappatta, 131 F.3d 152, 1997 WL 731790, at *3 (10th Cir. Nov. 25, 1997) (table) (Officer gave expert testimony "regarding the purposes for which drug dealers bring guns to drug transactions"); United States v. Peach, 113 F.3d 1247, 1997 WL 282867, at *3-4 (10th Cir. May 28, 1997) (table) (Detective "testified as an expert witness on crack cocaine sales and the differences between crack cocaine users, user-dealers, and dealers"), *cert. denied*, 522 U.S. 974, 118 S.Ct. 428, 139 L.Ed.2d 329 (1997); United States v. Quintana, 70 F.3d 1167, 1170-71 (10th Cir.1995) (Detective testified as an expert in explaining the drug jargon *608 used in wiretap evidence); United States v. Muldrow, 19 F.3d 1332, 1338 (10th Cir.) (Officer with "specialized knowledge" gained from education, training and experience in the investigation of drug trafficking offenses testified as an expert about "drug trafficking in the community, amounts of cocaine sold on the streets, the prices of cocaine," what qualifies as a large amount of cocaine, the dangers in transporting large amounts of drugs, and whether a particular amount was intended for distribution or personal use), *cert. denied*, 513 U.S. 862, 115 S.Ct. 175, 130 L.Ed.2d 110 (1994); United States v. Garcia, 994 F.2d 1499, 1506 (10th Cir.1993).(Agent qualified to testify as an expert on the value of methamphetamine labs and an operator's desire to protect the lab through the use of firearms); United States v. Harris, 903 F.2d 770 , 775- 76 (10th Cir.1990) (FBI agent testified as an expert about whether documents "had characteristics consistent with records of a drug business").

[4] United States v. Boney, 977 F.2d 624, 628 (D.C. Cir. 1992); United States v. Romero, 57 F.3d 565, 571 (7th Cir.1995)(Explanations of drug packaging and whether amounts tended were consistent with personal consumption are subjects about which an average juror may not know); *see also* United States v. Taylor, 18 F.3d 55, 60 (2d Cir.), *cert. denied*, 512 U.S. 1226, 114 S.Ct. 2720, 129 L.Ed.2d 845 (1994); United States v. Muldrow, 19 F.3d 1332, 1338 (10th Cir.) (specialized knowledge of law enforcement officer assisted jury in understanding the significance of the amount omitted); United States v. Lennick, 18 F.3d 814 (9th Cir.)(The length

The State's reliance upon its 1987 Utah Supreme Court case and several others outside this jurisdiction to determine that Adair's testimony is lay witness testimony under UT. R. EVID. 701 is obviously misplaced. Nearly all of the cases cited by the State in support of their argument predate the federal cases cited herein in footnotes "3" and "4" above. Additionally, these cases retain no authority in this jurisdiction, and each are separately distinguishable in that they do not pertain to the "specialized knowledge" surrounding drug trafficking. *Brief of Appellee* at pp. 13-14. The 10th Circuit Court of Appeals and other federal circuits have undertaken this analysis and have found the "specialized knowledge" surrounding drug trafficking to be governed by FED. R. EVID. 702, which is replicated under UT. R. EVID. 702.

The State then argues that Adair's testimony was admissible testimony by citing to cases involving analyses of opinion testimony. *Brief of Appellee* at pp. 15-17. This misconstrues Appellant's argument, however, by mistakenly leading this Court to believe Appellant is arguing the "admissibility" of Adair's testimony. Appellant did not challenge Adair's testimony as being inadmissible because he was offering opinion testimony, but challenged it based on lack of proper notification of an expert witness under UTAH CODE ANN. §77-17-13 and UT. R. CRIM. P. 16.

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of time it takes to grow a marijuana plant, the amount of marijuana it takes to make a cigarette and the amount of marijuana one could obtain from a single plant are matters that are likely to be outside the scope of most jurors' common knowledge and are properly within the realm of expert testimony), *cert. denied*, 513 U.S. 856, 115 S.Ct. 162, 130 L.Ed.2d 100 (1994); United States v. Hunter, 95 F.3d 14, 17 (8th Cir.1996)("Expert testimony that a certain quantity of drugs suggests distribution is admissible.") (citation omitted).

The 10th Circuit Court of Appeals has undeniably held that testimony on the significance of an amount of illegal substance is specialized. U.S. v. Muldrow, 19 F.3d 1332, 1338 (C.A.10 designates(Kan.),1994). In Muldrow, the 10th Circuit Court of Appeals found that since the officer testified concerning only his specialized knowledge, and did not go outside his specialized knowledge by opining about the defendant's intent, then his testimony was properly admitted as ***expert*** testimony. *Id.* (emphasis added). Adair's testimony regarding his specialized knowledge of drug trafficking is what designates it as "expert" testimony. *Id.*

II. APPELLANT ADEQUATELY PRESERVED HIS ARGUMENT ON THE VIOLATION OF UT. R. CRIM. P. 16

The State argues in a footnote to their brief that (a) UTAH CODE ANN. §77-17-13 governs over UT. R. CRIM. P. 16 since it deals specifically with the requirements for disclosure of expert testimony, and (b) Appellant did not properly preserve his argument regarding the violation of UT. R. CRIM. P. 16 at trial and it can only be addressed by a showing of plain error, which Appellant has not shown. *Brief of Appellee* at p. 11, fn. 3. The State's arguments fail since Appellant's argument was properly preserved at the trial on this matter and is properly challenged on appeal herein[5].

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[5] The State's argument that Appellant would be required to show plain error to have this issue addressed is also misplaced. The Utah Supreme Court has clearly stated that "[w]hen a party fails to preserve an issue for appeal, an appellate court will review the issue if the appealing party can demonstrate plain error or exceptional circumstances; party may also assert ineffective assistance of counsel in failing to preserve the issue." State v. Hansen, 2002 UT 114, ¶21, fn. 2, 61 P.3d 1062. Appellant believes this argument was fully preserved at trial; however, if it were found to not be so, it would be an obvious case of ineffectiveness of counsel for failing to do so.

As articulated in the argument, it is clear that a violation of Rule 16 occurred through the State's failure to disclose inculpatory evidence. In Appellant's opening brief, Appellant

A violation of UT. R. CRIM. P. 16 occurs when a party wrongfully fails to disclose inculpatory evidence. State v. Knight, 734 P.2d 913, 921 (Utah 1987). In State v. Perez, 2002 UT App. 211, 52 P.3d 451, this Court determined that the failure to disclose the anticipated testimony of a law enforcement expert witness was a clear violation of UT. R. CRIM. P. 16. It is apparent that cases such as the instant one are proper in challenging that a violation of UT. R. CRIM. P. 16 occurred when the State fails to disclose inculpatory evidence, as occurred here.

UT. R. CRIM. P. 16 governs discovery in criminal matters and, as argued in Appellant's opening brief and above, requires the State to produce inculpatory evidence upon request and comply fully and forthrightly. *Brief of Appellant* at pp. 19-21. Co-defendant's trial counsel, William L. Schultz, initially made the objection to Adair's testimony and Appellant's trial counsel joined in the objection. Tr. at pp. 104-107. Schultz not only objected based upon the fact that Adair was not listed on the witness list as an expert, but also based on the fact that there was no notification that Adair, whether designated an expert or not, was going to express any opinion as to distributional amounts of drugs. *Id.* at p. 106.

If evidence is disclosed under Rule 16, the prosecutor has a continuing obligation to disclose newly acquired information so as to avoid misleading the defense. State v. Kallin, 877 P.2d 138, 143 (Utah 1994). At the preliminary hearing, the State elicited testimony that a combination of the drugs

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challenged his trial counsel's ineffectiveness on the limited basis of failure to request a continuance as a remedy when the statute clearly indicated this as a remedy. Along those same lines, if Appellant's trial counsel requested the remedy of a Rule 16 violation, but this Court finds that a specific articulation of an objection under Rule 16 is required, Appellant's trial counsel's performance once again fell below an objective standard of reasonableness by failing to so articulate. If Appellant's counsel was ineffective in this manner, prejudice occurred in barring Appellant from challenging the matter on appeal. Hence, both prongs of the Strickland v. Washington test are satisfied. 466 U.S. 668, 104 S.Ct. 2052 (1984).

and the drug paraphernalia indicated that it was for distribution. Sometime between the preliminary hearing and the trial, the State determined that it should elicit more specific and precise information from Chief Adair regarding the significance of the amount of drugs found, the street price for such drugs and other aspects of drug trafficking. The State failed to disclose this additional testimony to Appellant. Schultz objected when the testimony was offered, specifically addressing the failure to disclose the evidence, and Appellant's trial counsel joined in the objection. Appellant's Rule 16 violation argument was adequately preserved below and should be considered by this Court.

III. THE NOTICE REQUIREMENTS OF UTAH CODE ANN. 77-17-13 REGARDING ADAIR'S TRIAL TESTIMONY WERE NOT MET BY EBERLING'S PRELIMINARY HEARING TESTIMONY

The State argues that Appellant received proper notification of Adair's expert testimony through Officer Eberling's testimony at the preliminary hearing held in this matter. *Brief of Appellee* at pp. 18-21. The State first relies upon a 1985 Utah Supreme Court case[6] pertaining to the substitution of one alibi witness for another. *Id.* at p. 19. This case is easily distinguishable since alibi witnesses are not "expert" witnesses with "specialized knowledge." Obviously if two witnesses can testify to the same circumstance creating an alibi for the defendant, then it would not be unfair surprise to substitute one for the other. "Specialized knowledge," however, is personal and based upon extensive background and experience.

The State then points to a non-controlling case from the District of Columbia Court of Appeals[7]. *Brief of Appellee* at pp. 19-20. In this case, the State argues that the "defendant claimed

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[6] State v. Ortiz, 712 P.2d 218 (Utah 1985).

[7] Reed v. U.S., 828 A.2d 159 (D.C. App. 2003)

the substitution of new expert violated the state notice statute," and that "the trial court rejected this challenge." *Id.* An actual reading of this case indicates that the defendant only made general objections to the expert's *qualifications* at trial and, on appeal, challenged the trial court's finding that the expert was qualified. Reed at 163. The D.C. appellate court found that the government substantially complied with the notification rule, but it was based not only upon the government's *timely* letter to defense counsel notifying them of the substance of the testimony, *but also* presentation of the witness's curriculum vitae *prior to* voir dire. This case is obviously distinguishable from the instant case since there was **no** notification whatsoever of Adair's expert testimony, either in the form of a letter or presentation of a curriculum vitae[8].

The State attempts to circumvent the notice requirements of UTAH CODE ANN. §77-17-13(1)(a) by stating that Eberling's testimony at the preliminary hearing was substantively identical to Adair's testimony at trial. In essence, the State is arguing the alternative notice provisions of §77-17-13(5)(a), which indicate as follows:

> For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's

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[8] In the case of an expert witness, in which qualifications go to both admissibility and weight, a curriculum vitae is material information by which the opposing party's counsel can challenge the expert's qualifications and credibility. Seivewright v. State, 7 P.3d 24 (Wyo. 2000). The purpose of a curriculum vitae is to allow the opposing party the opportunity to view that particular expert's qualifications and plan to rebut those, if the opposing party chooses to do so. Qualifications lend to a question of witness credibility of the expert, which is a question to be debated and ultimately decided by the trial court and jury.

proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.

The State's argument fails, however, for several reasons articulated below.

First, Eberling's testimony at the preliminary hearing was not identical to that offered by Adair at trial and challenged on appeal by Appellant. The State misquotes Eberling's testimony stating that Eberling testified that "the amount seized from the car in which defendant was riding - nearly 32 grams - was many times the amount needed for personal use." *Brief of Appellee* at p. 20. This testimony simply does not exist in the preliminary hearing transcripts and was fabricated by the State in a feeble attempt to support their inadequate argument. *Transcripts of Preliminary Hearing* at pp. 18-19.

Eberling testified that the amount for personal use was "small, small amount in a small bag." *Id.* He also testified that the quantity found in the passenger door was "saleable," and *with the scales and baggies* he believed it to be for distribution. *Id.* "Saleable" simply infers that something is able or fit to be sold and is not indicative of either an intent or amount. *Merriam-Webster's Online Dictionary*, "saleable," at www.m-w.com, March 12, 2004. Eberling's testimony at the preliminary hearing indicates that he believed it was for distribution *when coupled with* the paraphernalia found in co-defendant, Althoff's gym bag claimed by her and found in the backseat of the vehicle.

As for Eberling's trial testimony, cited by the State, it is supportive of the idea that Eberling *could not* have offered the same testimony elicited from Adair at trial. The colloquy at trial between Eberling and Appellant's trial counsel was as follows:

Q. I believe, if I can go back, Exhibit No. 1 right here was what you found on the console, right?
A. Yes.
Q. That was with a small amount?
A. Uh-huh.
Q. Is that a characteristic amount of what's sold?
A. Yes.
Q. It is. What – I mean you testified you believed it was for sale (inaudible). Do you know how many (inaudible)?
A. I don't--
Q. Is that just one?
A. I have no idea.

Tr. at p. 64. Eberling appears to be testifying that he is not aware of the significance of the amount of the drugs found in the console, just that it can be sold. However, it is axiomatic that *any* amount of drugs can be sold. This officer's testimony does not point to the specialized knowledge offered at trial by Adair, who is the chief of police.

Adair's trial testimony was clear and precise based upon his specialized knowledge. Adair testified that personal use amounts are usually packaged in "quarter or half grams...maybe even at the most a gram." Tr. at p. 90. He went on to testify that, depending on the quality, a quarter of a gram usually costs around $40 or $50 in Monticello and that "some really good crystal" can cost $100 for a half a gram. *Id.* at pp. 91-92. Adair also testified that he had seen the kinds of baggies found in the gym bag when he has previously found methamphetamine and that "usually people that have quantities of drugs have scales." *Id.* at p. 92.

Adair's testimony differs significantly from that of Eberling's testimony at the preliminary hearing. Eberling did not offer clear and precise testimony at the preliminary

hearing and, when coupled with his testimony at trial, it is questionable whether he even could have offer the type of testimony elicited from Adair at trial. It is not reasonable to assume that Eberling's testimony--that a drug is "saleable" and for distribution when coupled with the apparent distribution paraphernalia-- could have reasonably placed Appellant on notice that Adair would be testifying to the significance of the amount of drugs found, the street price for such drugs and other aspects of drug trafficking.

Second, the State's argument that Eberling's testimony reasonably put Appellant on notice of Adair's trial testimony is flawed simply because Eberling is not Adair and Adair is not Eberling. This Court undertook an analysis of UTAH CODE ANN. §77-17-13 recently in State v. Tolano, 2001 UT App. 37, ¶18, 19 P.3d 400 and determined as follows:

> . . .section 77-17-13 clearly contemplates that the expert take the stand and provide live testimony because such a provision would enable a party "to adequately prepare to meet adverse expert testimony." *Arellano*, 964 P.2d at 1170. Specifically, when an expert testifies at a preliminary hearing, the adverse party is able to obtain "the name and address of the expert, the expert's curriculum vitae, and a copy of the expert's report." Utah Code Ann. § 77-17-13(1)(b) (1999). In addition, the opportunity to cross examine the expert witness enables a party to elicit much more information than the mere notice requirements of section 77-17- 13. Therefore, we conclude that the 1999 amendment to section 77-17-13 did not overrule *Arellano*, and **an expert must provide live testimony at the preliminary hearing to satisfy the alternate notice provision of Utah Code Ann. § 77-17-13(5)(a) (1999).** [FN4]
>
> > FN4. Our conclusion is also supported by the plain language of subsection (5)(b), which states: "Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness." Utah Code Ann. § 77-17-13(5)(b) (1999) (emphasis added). As only a witness. .

> .may be called, **it is clear that the expert(s) must take the stand at the preliminary hearing in order to satisfy the notice requirements of section 77-17-13.**

Adair took the stand at the preliminary hearing, but *did not* offer testimony as to the significance of the amount of drugs or the uses of the drug paraphernalia found. Had the State elicited this testimony from him during the preliminary hearing, Appellant's trial counsel would have had the opportunity to obtain "the name and address of the expert, the expert's curriculum vitae, and a copy of the expert's report" (UTAH CODE ANN. §77-17-13(1)(b)), and elicit much more information under cross-examination than the mere notice requirements of §77-17-13. Tolano at ¶18. Since this testimony was *not* elicited from Adair until he was on the stand testifying at the trial, Appellant never obtained the information under §77-17-13(1)(b) and was not given the opportunity to explore the testimony and the witness more thoroughly prior to trial.

IV. THE STATE FAILS TO SATISFY ITS BURDEN TO SHOW THAT THE ERROR WAS NOT PREJUDICIAL

The State argues that "[e]ven assuming the trial court abused its discretion in admitting Chief Adair's testimony, defendant cannot show substantial prejudice." *Brief of Appellee* at p. 21. The State relies upon State v. Hopkins[9] to indicate that the burden of showing prejudice is on Appellant. *Id.* However, Hopkins was not a case of violation of either UTAH CODE ANN. §77-17-13 or UT. R. CRIM. P. 16, but rather a challenge that the

[9] 1999 UT 98, ¶20, n.3, 989 P.2d 1065.

prosecution failed to deliver requested discovery items *prior to the preliminary hearing*. The Utah Supreme Court found that Hopkins ". . .failed to demonstrate how he could have plausibly defeated state's case for probable cause to bind him over for trial," specifically setting forth the "[p]urpose of preliminary hearing is to decide whether there is probable cause to bind over for trial." Hopkins at ¶20. Hopkins is readily distinguishable from the instant case for this reason.

Whether an undisclosed expert witness is challenged under a violation of UT. R. CRIM. P. 16 or UTAH CODE ANN. §77-17-13, the burden of showing that prejudice did not occur falls upon the prosecution. Where the error consists of the failure of the prosecution to provide a defendant with evidence in violation of UT. R. CRIM. P. 16, the burden is on the State to persuade the court that the error did not unfairly prejudice the defendant. State v. Martin, 1999 UT 72, ¶14, 984 P.2d 975, *citing* State v. Knight, 734 P.2d 913, 919 (Utah 1987). Similarly, this Court shifted the burden to the State regarding a violation of the notice provisions of UTAH CODE ANN. §77-17-13 to show that the error did not unfairly prejudice the defendant. State v. Tolano, 2000 UT App 37, ¶14, 19 P.3d 400.

Under either violation, the State must show that, despite the errors, the outcome of the trial merits confidence and there is no reasonable likelihood of a more favorable result for the defendant. Knight at 921; Tolano at ¶14, *citing* State v. Arellano, 964 P.2d 1167, 1170 (Utah App. 1998). Because of the difficulties posed by the record's silence in cases involving a wrongful failure to disclose evidence, when the defendant can make a credible argument that the prosecutor's errors have impaired the defense, the State must persuade the

court that the error was harmless. Knight at 921. Since the State mistakenly focuses on the idea that Appellant has failed to show substantial prejudice, the State fails to even address its burden at all. *Brief of Appellee* at pp. 21-22. As argued in Appellant's opening brief, the failure to disclose Adair's inculpatory expert testimony was prejudicial to Appellant, resulting in a violation of Appellant's right to a fair trial. *Brief of Appellant* at pp. 26-27.

V. THE EVIDENCE WAS INSUFFICIENT

The State argues that Appellant's reliance upon State v. Layman, 953 P.2d 782 (Utah App. 1998) is misplaced since the drugs in that case were "discovered in a bag tucked into the waistband of a passenger in the vehicle and the State produced no evidence that defendant was even aware of the bag." *Brief of Appellee* at p. 26. The State goes on to argue that, although affirmed on certiorari by the Utah Supreme Court[10], the analysis contained in Layman I was not adopted since the Utah Supreme Court found the alternate reasonable hypothesis analysis "problematic and unnecessary."

The State bases its argument on the fact that the Utah Supreme Court disapproved of a mechanical reliance on a list of factors amounting to a checklist, and found those factors to be only relevant considerations in making the underlying determination. *Brief of Appellee* at pp. 26-28. Ironically, the State itself takes issue with only one factor discussed in Appellant's opening brief – the alternate reasonable hypothesis analysis – and contends that

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[10] State v. Layman, 1999 UT 79, 985 P.2d 911.

Appellant's argument fails based completely on that one factor. *Id.* It is clear that the State incorrectly analyzed Layman I and Layman II.

Layman II did not overrule Layman I, but rather affirmed it. While Layman II did take issue with the alternate reasonable hypothesis analysis in and of itself, it did not completely overrule its consideration altogether. The Utah Supreme Court articulated its determination when it stated as follows:

> There is nothing wrong with a succeeding court considering factors that were considered relevant by an appellate court analyzing a factually- similar context. But both trial and appellate courts need to be mindful that no such list is exhaustive, and that listed factors are only considerations. The final legal test is the most generally-worded one: here, whether there was a sufficient nexus between the defendant and the drugs or paraphernalia to permit a factual inference that the defendant had the power and the intent to exercise control over the drugs or paraphernalia. *See Fox*, 709 P.2d at 318.

Layman II. at ¶15.

Appellant's argument was not on one specific factor as the State would contend. Appellant discussed six (6) separate factors in his opening brief as relevant items to be considered by this Court in making its ultimate determination; to wit: (1) the circumstantial evidence failed to sufficiently exclude the alternative hypothesis; (2) Appellant's admitted use of methamphetamine earlier that day cannot support a conclusion of possession; (3) actual knowledge and location in vehicle does not prove possession; (4) a jury is not allowed to indulge in inference upon inference that could lead but to conjecture; (5) the State must prove case beyond a reasonable doubt; and (6) the jury cannot discredit Tonya's testimony

and replace it with its belief as to truth of evidence not in the record. *Brief of Appellant* at pp. 30-39. These factors all lead to an analysis pertaining to the "sufficient nexus" set forth by the Utah Supreme Court in Layman II. These six (6) factors lead to a conclusion that there was ***not*** a sufficient nexus between Appellant and the drugs or paraphernalia to permit a factual inference that Appellant had the power and the intent to exercise control over the drugs or paraphernalia. Layman II. at ¶15.

VI. THE PROSECUTOR MISSTATED THE LAW

The State argues that, "even assuming the prosecutor's remarks were in some way inaccurate, the jury instructions, which neither party objected to accurately state the applicable law." *Brief of Appellee* at p. 31. The State relies upon State v. Hopkins, 782 P.2d 475 (Utah 1989), which it analyzes as stating that "any impropriety resulting from prosecutor's closing-argument remarks was rendered harmless by court's jury instructions." *Id.* A reading of Hopkins does not resolve to this conclusion.

In Hopkins, the defense objected to the prosecutor's misstatement of law in his closing arguments. Rather than overruling the objection, as the trial court did in the instant case, the Hopkins court specifically undertook a colloquy with the jury to ensure that the misstatement did not mislead them. Specifically it stated as follows:

> I would indicate to the jury that you have heard the Court read the law to you, that you are aware of what the instructions are as far as the law is concerned. And you are to apply those instructions not to statements or argument that the counsel makes, but apply the law that the Court has indicated to you to the facts in the case. If it's in conflict of what they said, you will apply it as the Court has said.

Hopkins at 478-479. The Hopkins court did not just assume that the jury had the appropriate instructions, but went further to instruct them as to what they should apply should the instructions conflict with the prosecutor's closing remarks.

The State asks this Court to determine that, if the prosecutor's remarks misstated the law, the jury should just know to rely upon the jury instructions rather than his misstatements. The trial court in the instant did not take further precautions by specifically instructing the jury on his misstatements, but simply overruled Appellant's objection. As argued in Appellant's opening brief, the State's misstatement of the law in closing at trial in this matter called to the attention of the jury a matter it would not be justified in considering in determining its verdict, and the error was substantial and prejudicial. State v. Longshaw, 961 P.2d 925, 928 (Utah App. 1998), *citing* State v. Cummins, 839 P.2d 848, 852 (Utah App. 1992)(*quoting* State v. Peters, 796 P.2d 708, 712 (Utah App. 1990), *cert. denied*, 853 P.2d 897 (Utah 1993); *accord* State v. Span, 819 P.2d 329, 335 (Utah 1991); State v. Boyatt, 854 P.2d 50, 554-555 (Utah App.), *cert. denied*, 862 P.2d 1356 (Utah 1993).

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CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests that this Court reverse the trial court's Judgment.

DATED this 15th day of March, 2004.

Barton J. Warren
Attorney for Thomas Kevin Rothlisberger

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of March, 2004, I mailed, first class postage prepaid, true and correct copies of the foregoing Reply Brief to:

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Addendum ~A~

United States v. Diaz-Zappatta, 131 F.3d 152,
1997 WL 731790 (10th Cir. (N.M.) 1997)(table)

131 F.3d 152 (Table)
97 CJ C.A.R. 3002
Unpublished Disposition
(Cite as: 131 F.3d 152, 1997 WL 731790 (10th Cir.(N.M.)))

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA10 Rule 36.3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Tenth Circuit.

UNITED STATES OF AMERICA,
Plaintiff--Appellee,
v.
Jose DIAZ-ZAPPATTA and Ulises Ramos-Fernandez, Defendants--Appellants.

Nos. 96-2256, 96-2259.
(D.C.No. CR-95-430-LH)

Nov. 25, 1997.

Before ANDERSON, TACHA and BALDOCK, Circuit Judges.

ORDER AND JUDGMENT [FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

****1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Codefendants Ulises Ramos-Fernandez and Jose Diaz-Zappatta appeal from their convictions following a jury trial. [FN1] Both Ramos-Fernandez and Diaz- Zappatta were convicted on one count of conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. § 846, and on one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). Additionally, Diaz-Zappatta was convicted on a second count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1), and on two counts of carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). On appeal, Ramos-Fernandez contends that the evidence was insufficient to support his conviction for conspiracy. Diaz-Zappatta contends that the evidence was insufficient to support his convictions for carrying a firearm during a drug trafficking crime. We affirm the convictions of both defendants.

FN1. Because these two appeals involve the same underlying facts and testimony, we have companioned them for our consideration.

BACKGROUND

Based on information that unnamed persons were dealing crack cocaine out of an apartment located at 436 Louisiana S.E., Apt. 15, Albuquerque, New Mexico ("apartment 15"), Albuquerque police obtained and executed a search warrant for that address on June 29, 1995. When they arrived, the apartment door was open. Identifying themselves, the officers entered and immediately saw four men who were sitting on sofas in the living room. The officers ordered the men to stand up. According to the officers' trial testimony, when defendant Jose Diaz-Zappatta stood up, there was a loaded handgun on top of the sofa cushion exactly where he had been sitting. Although the gun had been hidden by Diaz-Zappatta's body while he sat, once he stood, it was plainly visible. [FN2] R. Vol. III at 76-77, 79-80, 83, 98, 143. Detective Sallee, who was recognized as an expert in the area of narcotics investigations, testified that a person would carry a weapon in the vicinity of a drug transaction to protect the drug deal. *Id.* at 83. According to Sallee, "it's very common for one of

the individuals involved in the deal to bring a weapon for protection of either his money or his drugs." *Id.* Sallee further testified that only Diaz-Zappatta had access to the gun. *Id.* "No one could get [the handgun] but Mr. Diaz because he was seated directly on top of it." *Id.*

FN2. Officer Sallee testified as follows regarding the handgun:
A: When I had Mr. Diaz stand up, I immediately noticed that there was a handgun right under where he was seated.
Q: Now, what do you mean by under?
A: He was sitting on top of it. It was on top of the cushion of the couch, and he was directly on top of the hand gun.
Q: So was his body, when he stood up and before he stood up, in direct physical contact or contact with this weapon?
A: Yes, it was.
Q: There was no cushion, no pillow, anything?
A: There was nothing in between him and the gun.
R. Vol. III at 76-77.

As the living room occupants were being secured, two officers entered the back bedroom, where they encountered Ramos-Fernandez and Lorenzo Hernandez. The first officer observed Hernandez drop a bag containing crack cocaine, and he also observed a large amount of money on the bed. *Id.* 164-65, 86. During the ensuing search, the officers took pagers from both Ramos-Fernandez and Hernandez, and they found an envelope addressed to Ramos-Fernandez at apartment 15. *Id.* at 121, 127, 166-67.

**2 At that time, the officers arrested Ramos-Fernandez because he lived at the apartment and was in the back room with the drugs. [FN3] R. Vol. III at 90. They arrested Diaz-Zappatta because he was in charge of the firearm, and they arrested Hernandez because he was in the bedroom with the crack cocaine. *See id.* At a later date, Cesar Cuba-Garcia was arrested. Eventually a federal grand jury returned a superseding indictment which charged all four men with various drug crimes, [FN4] and which also charged Diaz-Zappatta with carrying a firearm during and in relation to drug trafficking crimes. R. Vol. I, Tab 60.

FN3. One of the officers testified that they concluded Ramos- Fernandez lived at apartment 15 because of the envelope addressed to him at the address, and also because Ramos-Fernandez told another officer that he resided there. R. Vol. III at 105-06. Ramos-Fernandez's counsel asked questions which suggested that the testifying officer had insufficient personal information to support the conclusion that Ramos-Fernandez lived at apartment 15, but he made no hearsay objection.

FN4. The jury acquitted Cuba-Garcia on all counts.

Hernandez entered into a plea agreement. At trial, Hernandez testified that he began dealing drugs in February 1995. R. Vol. III at 184-86. His first contact was with Diaz-Zappatta and Cuba-Garcia, and thereafter, he generally purchased the drugs from Diaz-Zappatta. *Id.* at 185-86, 190. However, when Diaz-Zappatta was not available, Hernandez also purchased from Ramos-Fernandez on two or three occasions and from Cuba-Garcia on two or three occasions. *Id.* at 192. Responding to a specific question about where his purchases from Ramos-Fernandez took place, Hernandez answered, "There at his house," in apparent reference to apartment 15. *Id.* at 222.

According to Hernandez, Diaz-Zappatta, Ramos-Fernandez, and Cuba-Garcia were dealing drugs together at apartment 15, *id.* at 191-92, and they would talk about "the rocks, the money, and the drugs." *Id.* at 201. Although Diaz- Zappatta appeared to be the one in charge, it was Ramos-Fernandez who would contact Hernandez by calling his pager. *Id.* at 192, 194. During the period that he was buying drugs from the codefendants, Hernandez was making about $2,000 profit a month by reselling on the street. *Id.* at 195. Generally, his transactions with his codefendants occurred in the same way as the transaction on June

29, 1995. *Id.* at 190, 200, 207, 240. Thus, on the day that police executed the warrant, he had gone to the apartment to buy drugs which belonged to Diaz-Zappatta and Ramos-Fernandez. *Id.* at 197. On entry, he had greeted Diaz-Zappatta and then gone to see Ramos-Fernandez as usual. *Id.* at 200. When the police arrived, Hernandez was in the process of counting out the money. *Id.* at 196-97.

Diaz-Zappatta also testified. Diaz-Zappatta denied any personal involvement in any drug dealing, and claimed that he was merely waiting for Ramos-Fernandez to give him a ride on the day that he was arrested. Diaz-Zappatta also denied any knowledge that a drug deal was proceeding between Ramos-Fernandez and Hernandez, and he further disputed the testimony that he had been sitting on a gun. According to Diaz-Zappatta, the police were not telling the truth when they said that there was a gun underneath him. R. Vol. IV at 369.

DISCUSSION

Both Ramos-Fernandez and Diaz-Zappatta contend that the evidence is insufficient to support their convictions on certain counts. Whether the evidence is sufficient to support a conviction is a question of law which we review de novo. *United States v. Dashney,* 117 F.3d 1197, 1202 (10th Cir.1997). Viewing the evidence--both direct and circumstantial, together with the reasonable inferences drawn therefrom--in the light most favorable to the government, we must determine whether " '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In answering this question, we may neither weigh conflicting evidence nor consider the credibility of witnesses'." *United States v. Johnson,* 120 F.3d 1107, 1108 (10th Cir.1997) (quoting *United States v. Pappert,* 112 F.3d 1073, 1077 (10th Cir.1997) (citations and internal quotations omitted)); *United States v. Voss,* 82 F.3d 1521, 1524-25 (10th Cir.), *cert. denied,* 117 S.Ct. 226 (1996).

A. *Ramos-Fernandez*

****3** Ramos-Fernandez contends that the testimony is not sufficient to establish the existence of a conspiracy during the times alleged in the conspiracy count. He complains that, except for the date of his arrest, the government presented no evidence as to the dates of his alleged involvement in any conspiracy. Thus, he argues that "it would be an impermissible stretch of credulity to believe that Hernandez's testimony *must* relate to the times alleged in the Indictment." Appellant's Br. at 12. We disagree.

To obtain a conviction for conspiracy, the government must prove " '[1] that two or more persons agreed to violate the law, [2] that the Defendant knew at least the essential objectives of the conspiracy, ... [3] that the Defendant knowingly and voluntarily became a part of it, and [4] that the alleged coconspirators were interdependent.' " *United States v. Ivy,* 83 F.3d 1266, 1285 (10th Cir.) (quoting *United States v. Evans,* 970 F.2d 663, 668 (10th Cir.1992)), *cert. denied,* 117 S.Ct. 253 (1996).

In this case, the indictment charges that the conspiracy existed from at least April 1995 until September 1995. R. Vol. I, Tab 60, Count One at ¶ 1. In relation to Ramos-Fernandez, the indictment specifically charges overt acts related to the June 29, 1995, search and arrests. *Id.* at ¶ 3.

Clearly, Hernandez's testimony provided ample evidence from which the jury could have found the essential elements of Ramos-Fernandez's involvement in a conspiracy to violate drug laws on June 29, 1995. Moreover, taking the evidence in the light most favorable to the government, a reasonable juror could have found that Ramos-Fernandez had been engaged in similar acts over a course of months which spanned the larger period charged in the indictment. [FN5] Accordingly, we affirm his conviction.

> FN5. Even if this were not the case, a "variance between an indictment and the proof may be disregarded if it does not affect an essential element of the offense so as to impair substantial rights of the defendant." *United States v. Smith,* 838 F.2d 436, 440 n. 1 (10th Cir.1988) (citations omitted).

B. *Diaz-Zappatta*

Diaz-Zappatta does not appeal his convictions on the drug charges. Rather, he contends only that the officers' testimony that he was seated on top of the gun is insufficient to support his conviction for carrying a weapon during and in relation to a drug transaction in violation of 18 U.S.C. § 924(c)(1).

Although the Supreme Court has not specifically defined "carry" under § 924, it has given some guidance which assists our considerations. Thus, "a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction." *Bailey v. United States,* 116 S.Ct. 501, 507 (1995). Consistent with *Bailey,* to obtain a conviction under the "carry" prong of § 924(c)(1), the government must prove that the defendant possessed the firearm through dominion and control, and that he transported or moved it. *United States v. Smith,* 82 F.3d 1564, 1568 (10th Cir.1996).

Clearly the officer's testimony that Diaz-Zappatta was sitting directly on top of the gun, thereby giving him ready access to it, supports a finding that he possessed the gun through dominion and control. Nonetheless, Diaz-Zappatta complains that there was no evidence linking his possession to the drug transaction. In particular, he notes that nothing in Hernandez's testimony concerned guns. The argument ignores the officer's expert testimony regarding the purposes for which drug dealers bring guns to drug transactions. The fact that a drug transaction was occurring, in the open room immediately next to where Diaz-Zappatta sat, is sufficient to support a reasonable juror's inference that the gun was related to the drug offense. Moreover, in reviewing for sufficiency of the evidence, we " 'presume a nexus between a firearm and a drug trafficking offense when an individual with ready access to a firearm is involved in such an offense.' " [FN6] *United States v. Baker,* 30 F.3d 1278, 1280 (10th Cir.1994) (quoting *United States v. Coslet,* 987 F.2d 1493, 1495 (10th Cir.1993)).

> FN6. As we noted in *Baker:*
> The "nexus presumption" language used in our cases in no way changes the government's burden at trial to prove every element of a § 924(c)(1) offense.... [T]he "nexus presumption" language is merely a tool of appellate review by which this court judges whether the evidence introduced at trial, with its accompanying inferences and viewed in the light most favorable to the government, is sufficient to permit a reasonable jury to find the defendant guilty beyond a reasonable doubt.
> *Baker,* 30 F.3d at 1280 n. 1.

****4** Finally, Diaz-Zappatta contends that, even if there were a gun underneath him on the sofa, there is no evidence that he carried it. Again, viewing the record in the light most favorable to the government, we note the evidence that Diaz-Zappatta was sitting directly on top of the gun. Although there is no direct evidence that Diaz-Zappatta placed the gun beneath him in a way that both hid it and made it readily accessible, the circumstantial evidence is substantial. That is, in this case, only Diaz-Zappatta had access to the gun. From that circumstance, a reasonable juror could infer that Diaz- Zappatta transported and placed the gun on the sofa, exactly where he sat. [FN7]

> FN7. That Diaz-Zappatta was the only person with access to, and control over, the gun readily distinguishes his case from *United States v. Smith,* 82 F.3d 1564 (10th Cir.1996), which involved a handgun found on the bedroom dresser of a defendant who was convicted of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). In *Smith,* we rejected the government's assertion "that at some unknown time, [the defendant] moved the weapon from some unknown previous location to the dresser where it was found." *Id.* at 1568. Finding that there was no evidence supporting that inference, we noted that several persons had access to the firearm and the dresser. Thus, we concluded that "we can only speculate whether defendant Smith, or any one of the several other persons in the house, during and in relation to the drug trafficking offense, moved the firearms or placed them where they were found during the

> search." *Id.* By contrast, in this case, the evidence demonstrated that the gun was located in direct contact with Diaz-Zappatta's body, underneath him, where no one else could access it.

Accordingly, for the reasons stated, we AFFIRM the judgment of the district court.

131 F.3d 152 (Table), 1997 WL 731790 (10th Cir.(N.M.)), 97 CJ C.A.R. 3002 Unpublished Disposition

END OF DOCUMENT

Addendum ~B~

United States v. Peach, 113 F.3d 1247,
1997 WL 282867 (10th Cir. (Kan.) 1997)(table)

113 F.3d 1247 (Table)
Unpublished Disposition

(Cite as: 113 F.3d 1247, 1997 WL 282867 (10th Cir.(Kan.)))

H

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA10 Rule 36.3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Michael C. PEACH, Defendant-Appellant.

No. 96-3233.

May 28, 1997.

Before BRORBY, EBEL and KELLY, Circuit Judges.

ORDER AND JUDGMENT [FN*]

FN* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

**1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Mr. Michael C. Peach appeals from his convictions and sentences on two counts of possession with intent to distribute crack cocaine, two counts of using or carrying a firearm during and in relation to a drug trafficking offense, and one count of unlawful and wilful obstruction of commerce by robbery.

On December 18, 1994, Wichita Police Officer Patrick M. Chapman stopped the vehicle driven by Mr. Peach for making a lefthand turn without signaling. Officer Chapman then approached the driver's side of the vehicle and asked Mr. Peach for his driver's license. As Mr. Peach reached for his driver's license, Officer Chapman observed the tip of a plastic baggie between Mr. Peach's legs which Officer Chapman believed contained crack cocaine. When a second officer arrived on the scene, Officer Chapman asked Mr. Peach to exit his vehicle. When Mr. Peach did so, he left the plastic baggie on the driver's seat of the vehicle. The second office then placed Mr. Peach under arrest.

An inventory search of the vehicle revealed a loaded Titan Model 380 handgun underneath the driver's seat and a pager which repeatedly "went off" during the search. Analysis of the contents of the plastic baggie revealed it contained 1.41 grams of crack cocaine.

On February 7, 1995, two officers of the Wichita Police Department on routine patrol observed a vehicle driven by a black male traveling southbound on Broadway at a high rate of speed. The officers observed the vehicle's front windshield was cracked and decided to stop the vehicle.

As the officers exited their patrol car, the driver of the detained vehicle, Mr. Peach, got out of his vehicle. The officers told Mr. Peach to get back into his vehicle. However, Mr. Peach turned and ran from the scene. During the ensuing chase, the pursuing officer observed Mr. Peach place his right hand on what the officer believed to be the butt on a handgun and drop the weapon on the ground. When the officer finally tackled Mr. Peach, he observed Mr. Peach trying to stuff a plastic baggie into his mouth. The officers then retrieved the plastic baggie, which contained eight "rocks" of crack cocaine weighing 1.19 grams, and a loaded .9 mm. Ruger P 89 handgun. The officers also recovered a dark colored pager and $168 from Mr. Peach's person. An inventory search of the vehicle

revealed a registration card indicating Mr. Peach had recently purchased the vehicle and a pink pager.

On April 10, 1995, a black male entered Jimmie's Diner at 3111 N. Rock Road, Wichita, Kansas, with a handgun and demanded money while holding a hostage around the neck with the handgun jammed into her ribs. The robber obtained approximately $300 in cash and change from the cash register in a maroon bank bag. He then fled in a blue Ford Taurus.

**2 Officers responding to the robbery call noticed a vehicle fitting the description of the robber's vehicle traveling westbound on 32nd Street and gave chase. The officers eventually stopped the vehicle and took both occupants of the vehicle to the scene of the robbery for identification. The hostage, an employee of Jimmie's Diner, identified Mr. Peach as the robber.

On the ground near where the vehicle stopped, officers found a Marksman BB gun pistol and brown pants turned inside out with $202 in cash in the pockets, which was separated by denomination. In the vehicle, officers found rolled coins and fifty wrapped $1 bills along with a maroon bank bag belonging to Jimmie's Diner.

On April 19, 1995, the grand jury returned a five-count indictment against Mr. Peach. Counts I and III charged Mr. Peach with possession with intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. § 841(a)(1) (1994) and 18 U.S.C. § 2 (1994), on December 18, 1994, and February 7, 1995, respectively. Counts II and IV charged him with unlawfully carrying or using a firearm during and in relation to a drug trafficking offense, namely possession of crack cocaine with intent to distribute, in violation of 18 U.S.C. §§ 924(c) and 2 (1994), on December 18, 1994, and February 7, 1995, respectively. Count V charged him with unlawfully, knowingly and willfully obstructing, delaying, and affecting commerce and attempting to obstruct, delay, and affect commerce by robbing Jimmie's Diner on April 10, 1995, by means of actual and threatened violence, force, and fear of injury, in violation of 18 U.S.C. §§ 1951 and 2 (1994).

Prior to trial, the district court denied Mr. Peach's motion to dismiss Count V, but granted his motion to sever Count V from the remaining counts. On October 18, 1995, Mr. Peach proceeded to trial on Counts I through IV. A jury convicted him on all four counts on October 19, 1995.

On January 17, 1996, as a result of the Supreme Court's decision in *Bailey v. United States,* 116 S.Ct. 501 (1995), the district court granted Mr. Peach a new trial on Count II, using or carrying a firearm during and in relation to a drug trafficking offense. The district court denied Mr. Peach's motion for a new trial on Counts I, III, and IV. The court then sentenced Mr. Peach to thirty-six months imprisonment on Counts I and III, to run concurrently, and sixty months imprisonment on Count IV, to run consecutively to his sentences for Counts I and III.

On March 19-20, 1996, Mr. Peach was retried on Count II and found guilty. On April 3, 1996, the district court denied Mr. Peach's renewed motion for acquittal.

On May 21, 1996, Mr. Peach was tried on Count V. The jury convicted him on May 22, 1996.

On June 17, 1996, the district court sentenced Mr. Peach to twenty years imprisonment on Count II and sixty-three months imprisonment on Count V, both sentences to run consecutively to his prior sentences.

On appeal, Mr. Peach contends: (1) in his first trial, the district court erred in allowing Detective Fettke to testify as an expert on drug dealers and regarding a conversation Detective Fettke had with him in December 1994; (2) the evidence was insufficient to sustain his convictions on Counts I and III; (3) the district court erred in failing to give a jury instruction on aiding and abetting as charged in the indictment in Counts I through IV; and (4) the district court lacked jurisdiction to prosecute him on Count V. [FN1]

FN1. In his reply brief, Mr. Peach asserts for the first time the evidence was insufficient to convict him on Count V and

that the district court erred in giving an aiding and abetting instruction on Count V. We will not address these issues, however, because issues raised for the first time in the reply brief are deemed waived and will not be considered. *See Codner v. United States,* 17 F.3d 1331, 1332 n. 2 (10th Cir.1994).

**3 As a preliminary matter, we address the government's assertion we lack jurisdiction to consider Mr. Peach's claims related to his convictions on Counts I, III, and IV because his notice of appeal was untimely. The government's argument is wholly without merit. A notice of appeal must be filed within ten days of the entry of the judgment appealed from. Fed. R.App. P. 4(b). For the purposes of Fed. R.App. P. 4(b), a judgment is entered "when it is entered on the criminal docket." *Id.* Although the judgment on Counts I, III, and IV was filed January 30, 1996, it was entered on the criminal docket sheet on January 31, 1996. Therefore, Mr. Peach's February 12, 1996, filing of a notice of appeal was timely. *See* Fed. R.App. P. 26(a) ("The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, ... in which event the period runs until the end of the next day which is not one of the aforementioned days."). [FN2]

FN2. This appeal was docketed as No. 96-3054 and dismissed for lack of finality on August 26, 1996, by a jurisdictional panel of this court.

I.

Mr. Peach contends that at the October 1995 trial on Counts I-IV:(a) the district court erred in allowing Detective Fettke to testify as an expert on crack cocaine sales and differences between drug dealers and simple drug users, and (b) the district court prejudiced his defense and denied him his Sixth Amendment right to a fair trial by permitting Detective Fettke to testify regarding a conversation Detective Fettke had with him in December 1994.

a.

Mr. Peach contends the district court erred in allowing Detective Fettke to testify as an expert witness. "The determination of whether expert testimony should be admitted rests with the sound discretion of the [district] court." *United States v. Esch,* 832 F.2d 531, 535 (10th Cir.1987), *cert. denied,* 485 U.S. 908 (1988). Therefore, we defer to the district court and review its determination only for abuse of that discretion. *Id.*

At the first trial in October, 1995, Detective Fettke testified as an expert witness on crack cocaine sales and the differences between crack cocaine users, user-dealers, and dealers based on his training and experience in the sale of narcotics. [FN3] Detective Fettke testified to his extensive training and experience in drug sales during his eleven years with the Wichita Police Department. Thereafter, he testified the "normal" crack cocaine user only possesses: one $20 "rock" of crack cocaine, which weighs approximately 0.10 grams; a crack pipe; and a lighter or a torch to provide the high heat necessary to vaporize the cocaine. Detective Fettke testified users usually do not carry more than $20-$40 with them and usually do not carry firearms for protection. He testified a user normally only carries firearms to be pawned or traded for cocaine. Finally, Detective Fettke testified crack cocaine users usually do not have any money or any valuable possessions, because they spend all their money on and trade all their possessions for more cocaine.

FN3. Although the district court did not formally accept Detective Fettke as an expert witness, the court knew the prosecution offered him as an expert witness, heard him describe his qualifications and then allowed him to give his opinion testimony. We therefore assume the court accepted Detective Fettke as an expert witness. *See United States v. McDonald,* 933 F.2d 1519, 1522 n. 2 (10th Cir.), *cert. denied,* 502 U.S. 897 (1991).

In regard to user-dealers, Detective Fettke testified

user-dealers often carry firearms with them; occasionally have pagers to make them more accessible to their buyers; and normally do not carry their crack pipes and drug usage paraphernalia with them. He noted user-dealers usually have "some of the nicer things that go along with dealing cocaine."

**4 The proper inquiry concerning expert testimony is whether the jury is able to understand the evidence without the specialized knowledge available from the testimony of the expert witness. *United States v. McDonald,* 933 F.2d at 1522. In this case, the basic facts were the amount of crack cocaine found in plastic baggies, 1.41 and 1.19 grams, coupled with the possession of loaded firearms, pagers, and over $100 in cash. Without understanding the drug trade and how a drug dealer works, a jury could not be expected to understand the significance of this evidence. *McDonald,* 933 F.2d at 1522. Detective Fettke provided the specialized knowledge needed to understand the evidence presented. Therefore, we hold the district court did not abuse its discretion in allowing Detective Fettke to testify as an expert witness.

b.

Mr. Peach asserts the district court prejudiced his defense and denied him his Sixth Amendment right to a fair trial by permitting Detective Fettke, over Mr. Peach's objections, to testify regarding a conversation Detective Fettke had with him in December 1994.

During the government's case-in-chief, the government called Detective Fettke to testify that Mr. Peach told him he "does not distribute or use crack cocaine." Detective Fettke's testimony was presented to refute Mr. Peach's defense that he was a simple user of cocaine and not a dealer. The district court found this testimony relevant and concluded its probative value was not outweighed by the prejudice to Mr. Peach. Immediately following Detective Fettke's testimony, the district court instructed the jury that the testimony could only be used for the purpose of determining whether Mr. Peach possessed the necessary intent to distribute crack cocaine and not for the purpose of whether Mr. Peach was engaged in an illegal transaction when the conversation took place.

"We review both the district court's determination of the relevancy of the evidence and its conclusion that the probative value of the evidence is not substantially outweighed by its prejudicial effect for an abuse of discretion." *United States v. Flanagan,* 34 F.3d 949, 952 (10th Cir.1994).

Federal Rule of Evidence 401 provides that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mr. Peach did not dispute his possession of 1.41 and 1.19 grams of crack cocaine on December 18, 1994, and February 7, 1995, respectively. Rather, his defense centered on his being a simple user of crack cocaine and not a distributor. Therefore, Detective Fettke's testimony was relevant to Mr. Peach's intent to use or to distribute the crack cocaine in his possession.

Federal Rule of Evidence 403 provides relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The evidence here was certainly damaging to Mr. Peach's defense: it refuted his assertions that he was a simple user of crack cocaine and not a dealer, and it showed additional involvement with the police. However, it did not rise to the level of unfair prejudice. "[T]he unfair prejudice aspect of Rule 403 'cannot be equated with testimony which is simply unfavorable to a party. It must be unfair in the sense that it would be misleading and not aid and assist the jury in making a material determination in the case.' " *Flanagan,* 34 F.3d at 953 (quoting *McEwen v. City of Norman,* 926 F.2d 1539, 1549-50 (10th Cir.1991)). Accordingly, we hold the district court did not abuse its discretion in admitting Detective Fettke's testimony regarding the conversation he had with Mr. Peach in December 1994.

II.

**5 Mr. Peach contends there was insufficient evidence to support his convictions on Counts I and III for possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

Mr. Peach asserts he is merely a user of cocaine, not a distributor.

To obtain a conviction under 21 U.S.C. § 841(a)(1) for possession with intent to distribute crack cocaine, the government must establish Mr. Peach (1) possessed crack cocaine; (2) knew he possessed crack cocaine; and (3) intended to distribute the crack cocaine. *See United States v. Wilson,* 107 F.3d 774, 778 (10th Cir.1997). Mr. Peach does not claim he did not knowingly possess crack cocaine. Mr. Peach challenges the sufficiency of the evidence to establish he intended to distribute the crack cocaine rather than use it personally.

We review the record for sufficiency of the evidence *de novo. Wilson,* 107 F.3d at 778. " 'Evidence is sufficient to support a conviction if a reasonable jury could find the defendant guilty beyond a reasonable doubt, given the direct and circumstantial evidence, along with reasonable inferences therefrom, taken in a light most favorable to the government.' " *Id.* (quoting *United States v. Mains,* 33 F.3d 1222, 1227 (10th Cir.1994)). "Rather than examining the evidence in 'bits and pieces,' we evaluate the sufficiency of the evidence by 'consider[ing] the collective inferences to be drawn from the evidence as a whole.' " Wilson, 107 F.3d at 778 (quoting *United States v. Hooks,* 780 F.2d 1526, 1532 (10th Cir.), *cert. denied,* 475 U.S. 1128 (1986)). Thus, we must affirm the conviction if the "collective inferences" from the totality of the evidence could have led a reasonable jury to find beyond a reasonable doubt that Mr. Peach intended to distribute the crack cocaine he possessed.

In reviewing the record, we hold there was sufficient evidence to establish Mr. Peach's intent to distribute the crack cocaine found in his possession on December 18, 1994, and February 7, 1995. The evidence demonstrated: Mr. Peach possessed 1.41 and 1.19 grams of crack cocaine on December 18, 1994, and February 7, 1995, respectively; he did not have with him any paraphernalia associated with drug use on either occasion; on February 7, 1995, he was carrying $168 in cash on his person; on both occasions, he possessed at least one pager; and on both occasions he possessed a loaded firearm. Considering the expert testimony of Detective Fettke, evidence indicates intent to distribute crack cocaine. Furthermore, this court has indicated the presence of firearms in connection with drugs, as with the two firearms in this case, may be probative evidence of an intent to distribute the drugs. *See United States v. Hager,* 969 F.2d 883, 888 (10th Cir.), *cert. denied,* 506 U.S. 964 (1992). Taken as a whole, the evidence was sufficient for a reasonable jury to conclude beyond a reasonable doubt that Mr. Peach possessed crack cocaine with the intent to distribute.

III.

**6 Mr. Peach contends the district court erred in failing to give an aiding and abetting instruction on Counts I through IV. Mr. Peach argues that in order for the jury to find guilt beyond a reasonable doubt all elements of the offenses charged must be given to the jury and, thus, failing to give an aiding and abetting instruction as charged in the indictment is *per se* reversible error, especially when the evidence presented at trial was insufficient to support the charges of aiding and abetting in the indictment. Mr. Peach asserts the district court constructively amended the indictment by omitting the aiding and abetting charges from its reading of the indictment to the jury and from its jury instructions. [FN4]

> FN4. From the record before us, we cannot discern whether the district court actually read the redacted indictment to the jury in addition to submitting a written copy to the jury in the jury instructions. However, the distinction is irrelevant to our analysis. Our holding would be the same whether the district court read the redacted indictment to the jury, simply allowed the jury to have a copy thereof in the jury instructions, or both.

Because Mr. Peach did not object to the district court's omitting the aiding and abetting instruction, we review only for plain error. Fed.R.Crim.P. 52(b) . *See United States v. DeSantiago-Flores,* 107 F.3d 1472, 1479 (10th Cir.1997). "Plain error is one that 'affects the defendant's right to a fair and impartial trial.' " *United States v. Galbraith,* 20

F.3d 1054, 1057 (10th Cir.) (quoting *United States v. Smith,* 13 F.3d 1421, 1424 (10th Cir.), *cert. denied,* 513 U.S. 878 (1994)), *cert. denied,* 513 U.S. 889 (1994). "It must have been both 'obvious and substantial.' " *Id.* at 1057 (quoting *Smith,* 13 F.3d at 1424).

In this case, the district court's omission of the aiding and abetting charges from the reading of the indictment to the jury and from the jury instructions ensured Mr. Peach received a fair trial as he was the only person charged in the indictment. Therefore, there can be no error in the district court's actions.

Next, Mr. Peach is correct that the jury must find a defendant guilty beyond a reasonable doubt on all elements of the offense charged. *See Sullivan v. Louisiana,* 508 U.S. 275, 277-78 (1993) (a criminal conviction must rest upon a jury determination that the defendant is guilty beyond a reasonable doubt of each element of the offense charged). However, aiding and abetting is a separate offense with its own elements under 18 U.S.C. § 2, and not an element of 21 U.S.C. § 841(a)(1), possession with intent to distribute a controlled substance, or of 18 U.S.C. § 924(c)(1), using or carrying a firearm during and in relation to a drug trafficking offense. *See Wilson,* 107 F.3d at 778 (discussing elements of 21 U.S.C. § 841(a)(1)); *United States v. Ruth,* 100 F.3d 111, 112-13 (10th Cir.1996) (discussing elements of § 924(c)(1)); *United States v. Yost,* 24 F.3d 99, 104 (10th Cir.1994) (discussing elements of 18 U.S.C. § 2). Therefore, a court need not instruct a jury on aiding and abetting in order to instruct on all the elements of possession with intent to distribute or using or carrying a firearm during and in relation to a drug trafficking offense. In fact, it would be error for the district court to allow an aiding and abetting instruction simply because the charge was included in the indictment where, as in this case, the evidence presented at trial does not support such a charge. *See United States v. Martin,* 747 F.2d 1404, 1407-08 (11th Cir.1984).

**7 Finally, we review whether the district court constructively amended the indictment by omitting the aiding and abetting instruction.

> A constructive amendment occurs "if the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment." "The specific inquiry is whether the jury was permitted to convict the defendant upon 'a set of facts distinctly different from that set forth in the indictment.' "

Galbraith, 20 F.3d at 1058 (quoting *Hunter v. New Mexico,* 916 F.2d 595, 599 (10th Cir.1990), *cert. denied,* 500 U.S. 909 (1991)).

The key to constructive amendment is the defendant's conviction of an offense not charged in the indictment. Since it is impossible for the jury to have convicted Mr. Peach on a charge which was not even presented to them, the district court's omission of the aiding and abetting charges did not constructively amend the indictment. If anything, the district court's omissions amounted to a judgment of acquittal on the aiding and abetting charges.

IV.

Mr. Peach contends the district court lacked jurisdiction to prosecute him under the Hobbs Act, 18 U.S.C. § 1951, for the April 10, 1995, robbery of Jimmie's Diner. Mr. Peach asserts the government "seized" his case from Kansas authorities in violation of his civil and constitutional rights. Finally, Mr. Peach argues the government selectively prosecuted him. [FN5] We review challenges to jurisdiction *de novo. F.D.I.C. v. Hulsey,* 22 F.3d 1472, 1479 (10th Cir.1994).

> FN5. He also perfunctorily asserts the district court lacked personal jurisdiction over him. Because he fails to develop this issue, we decline to review this claim. *Murrell v. Shalala,* 43 F.3d 1388, 1389 n. 2 (10th Cir.1994).

"The Hobbs Act provides for the punishment of anyone who '*in any way or degree* obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do.' " *United States v. Zeigler,* 19 F.3d 486, 489 (10th Cir.) (quoting 18 U.S.C. § 1951(a)), *cert denied,* 513 U.S. 1003

(1994) (emphasis in original). Under the Act, commerce includes " 'all commerce between any point in a State, ... and any point outside thereof; ... and all other commerce over which the United States has jurisdiction.' " *Id.* (quoting 18 U.S.C. § 1951(b)(3)).

"Consistent with this broad statutory language, ... the 'jurisdictional predicate of the Hobbs Act can be satisfied by a showing of "any *de minimis* effect on commerce." ' " *United States v. Bolton,* 68 F.3d 396, 398 (10th Cir.1995) (quoting *Zeigler,* 19 F.3d at 489), *cert. denied,* 116 S.Ct. 966 (1996). "In order to establish the requisite *de minimis* effect on commerce, the government need only produce evidence establishing that the assets of a business engaged in interstate commerce were depleted during the commission of the crime." *Id.*

During the trial on Count V, the Hobbs Act charge, the government presented evidence establishing that the robbery of Jimmie's Diner depleted the assets of business engaged in interstate commerce. Specifically, the government demonstrated the money taken in the robbery would have been used to purchase supplies for the diner from Wonder Hostess in St. Louis, Missouri; Milani Foods in Charlotte, North Carolina; Mid-Central/SYSCO in Kansas City, Missouri; and Meadow Gold in Dallas, Texas. This evidence is sufficient to demonstrate a *de minimis* effect on interstate commerce under the Hobbs Act. *See Bolton,* 68 F.3d at 399; *Zeigler,* 19 F.3d at 491-93. Therefore, we hold the district court had jurisdiction to prosecute Mr. Peach for violating the Hobbs Act.

****8** Finally, Fed.R.Crim.P. 12(b)(1) requires a defendant to raise "objections based on defects in the institution of the prosecution" prior to trial. "A selective prosecution claim clearly qualifies as such an objection." *United States v. Bryant,* 5 F.3d 474, 476 (10th Cir.1993). Furthermore, Fed.R.Crim.P. 12(f) presumes these objections are waived if they are not raised prior to trial; a presumption which can be overcome with a showing of cause. The record in this case indicates Mr. Peach failed to raise selective prosecution prior to trial and he failed to show cause for this untimeliness. Accordingly, Mr. Peach's selective prosecution claim is waived.

For the foregoing reasons, we AFFIRM Mr. Peach's convictions and sentences on all counts.

113 F.3d 1247 (Table), 1997 WL 282867 (10th Cir.(Kan.)) Unpublished Disposition

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